

Page 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF PENNSYLVANIA

3 ANDREA CONSTAND, : 2:05-cv-01099-ER
4 Plaintiff, : PHILADELPHIA, PA
5 vs. :
6 WILLIAM H. COSBY, JR., : June 26, 2015
7 Defendant. : 10:07 a.m.

8 TRANSCRIPT OF MOTION HEARING
9 BEFORE THE HONORABLE EDUARDO C. ROBRENO
10 UNITED STATES DISTRICT JUDGE

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27 (Proceedings recorded by electronic sound recording,
28 transcript produced by transcription service.)

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Page 2

1 I N D E X

2 PAGE

3 ARGUMENT:

4 By Ms. Sproul 3 , 48
5 By Mr. Gowen 26 , 55
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12 E X H I B I T S

13 NUMBER DESCRIPTION MARKED ADMITTED
14 (None marked.)
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ARGUMENT - MS. SPROUL

Page 3

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2

THE COURT: Okay. Let me hear from the
movant.

4

MS. SPROUL: I'm not sure, Your Honor,
which one of us is designated as the movant, but --

6

THE COURT: You filed the motion.

7

MS. SPROUL: I filed the motion, right,
in 2006.

9

Okay. Your Honor, I'm Gayle Sproul. I
represent The Associated Press.

11

In a nutshell --

12

THE COURT: Yeah, why don't you come up
here? Yeah, yeah.

14

MS. SPROUL: Thank you, Your Honor.

15

In a nutshell, Your Honor, Mr. Cosby is
urging the court to maintain everything in this file
that has been sealed -- everything in this case that
has been sealed under seal because, first, he claims
that the information that's under seal is not a
matter of legitimate public concern. He claims that
release of the information would invade his privacy
and that of third parties. He argues that release of
information would undermine the settlement agreement
and the judicial process. And he argues that it
would prejudice a current proceeding in another

ARGUMENT - MS. SPROUL

Page 4

1 court.

2 That is the case that we referred to as
3 Green 1, Your Honor, which is now pending in the
4 District of Massachusetts. It's a case in which
5 Mr. Cosby has been accused of sexual assault and
6 defamation by three named female plaintiffs.

7 In fact, none of Mr. Cosby's assertions
8 actually demonstrate good cause as that term has been
9 defined in Pansy and Cipollone and Glenmede Trust.

10 First of all, he attempts to portray The
11 AP as some sort of villain that would make improper
12 use of the public contents of a public docket.

13 There's no authority for that
14 proposition, nor does he cite any. News reporting
15 is, of course, not an improper purpose. It's
16 protected by the First Amendment.

17 The test, instead, is whether he's able
18 to demonstrate that he -- not third parties, but
19 he -- will suffer a clearly defined and serious
20 injury from disclosure.

21 The Third Circuit has made clear that
22 it's not just any embarrassment that can be deemed an
23 injury, but a particularly serious embarrassment. I
24 believe it was the court in Cipollone that said any
25 disclosure that a person does not intend tends to

ARGUMENT - MS. SPROUL

Page 5

1 cause some embarrassment. But what he has to show
2 here is a particularly serious injury.

3 In fact, he cannot do that. First, just
4 as an -- just to begin, Rule 5.15, which is the
5 reason that we're here today, is a reflection of the
6 judiciary's commitment to transparency in the courts.
7 Not everything is going to be made public, but it
8 demonstrates also that the passage of time can have
9 an impact on what should be made public.

10 And in this case, it's asking -- it's
11 requiring the court to take a look at everything
12 that's already been sealed and examine it under
13 today's circumstances.

14 THE COURT: Now, you're at somewhat of a
15 disadvantage because you don't know what's under
16 seal.

17 MS. SPROUL: Correct.

18 THE COURT: So --

19 MS. SPROUL: I don't.

20 THE COURT: So you could -- you're
21 arguing somewhat hypothetically at that point.
22 Mr. Gowen knows what's under seal. You do not.

23 MS. SPROUL: I do not.

24 THE COURT: So how does that impact your
25 analysis?

ARGUMENT - MS. SPROUL

Page 6

1 MS. SPROUL: Well, I can't give you --

2 THE COURT: In other words, you're
3 assuming that what's under seal is going to -- I
4 guess for purposes of this argument, you're assuming
5 that it would cause some embarrassment, but it would
6 not be particularly serious embarrassment within the
7 meaning of that term.

8 MS. SPROUL: I am arguing that, and I am
9 arguing -- because, as Your Honor has said, I don't
10 know what's in the record. And I -- I think when a
11 party argues that everything that's under seal has to
12 stay under seal and doesn't take a
13 document-by-document, page-by-page approach, which is
14 what Pansy requires --

15 THE COURT: Um-hmm.

16 MS. SPROUL: -- then it can't be that
17 everything will cause embarrassment.

18 THE COURT: Now, you can tell from the
19 docket that some of it is the briefs and memoranda
20 that lawyers have filed. What do you think of that?

21 MS. SPROUL: Your Honor, I think that
22 they should be unsealed. I mean, one of the things
23 that we didn't say in our brief but -- we were
24 waiting to see what Mr. Cosby had to say -- is that
25 there's a role for redaction in this matter.

ARGUMENT - MS. SPROUL

Page 7

1 What the courts require is, essentially,
2 that, you know, Your Honor -- unfortunately, it falls
3 to you -- has to -- the plaintiff can -- I mean --
4 sorry -- the defendant can suggest what he believes
5 needs to be redacted. He didn't do that here.

6 THE COURT: Um-hmm.

7 MS. SPROUL: But that is the way it
8 should proceed, because only he can say -- and it's
9 important to note at this point, Your Honor, that
10 Mr. Cosby hasn't put in a declaration.

11 THE COURT: Um-hmm.

12 MS. SPROUL: There's no evidence from
13 him directly about any embarrassment in this case.
14 You know, he has -- he took a deposition, and that --
15 that is somewhere, and it's under seal, the parts of
16 it that are on file with the court.

17 We have no -- and Your Honor has no way
18 of judging what he would say --

19 THE COURT: Um-hmm.

20 MS. SPROUL: -- because he has not -- he
21 has not demonstrated that in this proceeding, and I
22 believe he has an obligation to do that.

23 But with respect to briefs and
24 memorandum, I think it's clear that legal argument,
25 you know, any sort of recitation of facts that are

ARGUMENT - MS. SPROUL

Page 8

1 not facts that are unduly sensitive --

2 Mr. Gowen cites in his brief testimony
3 that Mr. Cosby gave about his marriage, about
4 prescription drugs, his sex life, and so on.

5 You know, if those things are unduly
6 sensitive, even without his declaration, it may be
7 that the court will decide that those matters should
8 not be released.

9 But there are many other facts in this
10 case, and they're under seal. And so what we're
11 asking is that -- is that the court follow what the
12 rule is, which is, essentially, that anything that
13 there's no cause for sealing should come out --

14 THE COURT: Um-hmm.

15 MS. SPROUL: -- of the sealing and be
16 made public, available on the docket through PACER to
17 anyone who would like to see it.

18 THE COURT: What do you think of the --
19 we don't have a settlement agreement on the record
20 here. What do you think of the argument that
21 Mr. Cosby entered into a settlement agreement and --
22 with the plaintiff and that this court should honor
23 the agreement that he entered into with another
24 party, that there was some reliance on that?

25 MS. SPROUL: There are two points on

ARGUMENT - MS. SPROUL

Page 9

1 that, Your Honor.

2 First of all, again, we don't have his
3 testimony. We don't have a declaration from him
4 where he says, I relied. We have a brief that says
5 he relied. The settlement agreement has not been
6 given to Your Honor to look at in camera. So there's
7 no evidence of that. There's a brief.

8 But in addition to that, there's two
9 facts that are of importance here. One is that -- or
10 two concepts that are important.

11 One is that the parties cannot divest
12 Your Honor of discretion by making an agreement to do
13 something and keep it confidential.

14 It's very similar to parties in
15 discovery entering into a protective arrangement, a
16 confidentiality agreement, in which they agree to
17 keep things, you know, between themselves. But the
18 court is not required to so order that agreement.

19 The court, in fact, is tasked by the
20 Judicial Conference with, you know, being very
21 cautious about entering into -- about signing
22 something into effect as a protective order.

23 So just because the parties have agreed
24 to it -- and we cite a couple of cases in our
25 footnote; I think it's Footnote 11 in our brief --

ARGUMENT - MS. SPROUL

Page 10

1 it's not -- it's not --

2 THE COURT: Okay.

3 MS. SPROUL: -- it doesn't take away
4 from if you, Your Honor, your discretion in this
5 matter.

6 Secondly, in Pansy, the court downplays
7 the need to encourage settlements as a basis for
8 ensuring confidentiality.

9 They say -- quoting U.S. versus Kentucky
10 Utilities, they say, settlements will be entered into
11 in most cases whether or not confidentiality can be
12 maintained. In other words, there's lots of reasons
13 why parties enter into settlement agreements, not
14 just because of confidentiality.

15 They said, the parties might prefer to
16 have confidentiality, but this does not mean that
17 they would not settle otherwise; for one thing, if
18 the case goes to trial, even more is likely to be
19 disclosed than if the public had access to pretrial
20 matters.

21 And then they say from their own voice,
22 to the extent that parties may have to more often
23 enforce orders of confidentiality in private contract
24 suits -- in other words, sue each other for
25 disclosing something that they agreed not to -- we

ARGUMENT - MS. SPROUL

Page 11

1 believe this may, in fact, be preferable to the
2 current trend of increasing judicial secrecy.

3 So both with respect to the parties --
4 and, of course, the plaintiff is not here, and the
5 plaintiff does not object to the unsealing here. The
6 plaintiff -- apparently, in the stipulation of
7 confidentiality that was signed when The National
8 Enquirer case was consolidated with this one, the
9 plaintiff signed under protest with respect to
10 confidentiality. There's an explicit paragraph in
11 there that says that.

12 So the fact that these parties have
13 different views on confidentiality and the fact that
14 Mr. Cosby may -- and I emphasize "may" -- have relied
15 on that, that single provision that we haven't seen,
16 doesn't matter.

17 THE COURT: Now, I -- your -- your
18 brief -- let me put it this way. Is Pansy the
19 authority that this court has to apply; that is,
20 apply the Pansy factors and then call it depending
21 upon that balance? Is that how you see the case?

22 MS. SPROUL: Yeah.

23 THE COURT: Because you did not go
24 through the Pansy factors in your --

25 MS. SPROUL: We didn't go through them

ARGUMENT - MS. SPROUL

Page 12

1 as factors, Your Honor.

2 THE COURT: Yeah.

3 MS. SPROUL: But what -- the reason that
4 we didn't is because we don't know really exactly
5 what's under seal.

6 And there are certain motions under seal
7 that perhaps wouldn't be characterized as discovery
8 motions. I don't know. It has to do with motions
9 for sanctions.

10 And there are cases -- and I have some;
11 they're not in the brief, but I have some -- that
12 are -- that talk about different types of motions.
13 You know, you have to apply different standards to
14 different motions and to different judicial records.

15 THE COURT: Now -- well, that brings me
16 to the point -- and maybe we'll go back to that, but
17 just to clarify that, if a motion is a discovery
18 motion --

19 MS. SPROUL: Um-hmm.

20 THE COURT: -- you would agree that the
21 right of access would not apply to that?

22 MS. SPROUL: I would agree that under
23 the current Third Circuit analysis [indiscernible] --

24 THE COURT: But you make a point some of
25 them may not be discovery --

ARGUMENT - MS. SPROUL

Page 13

1 MS. SPROUL: Yeah.

2 THE COURT: -- motions --

3 MS. SPROUL: Yeah.

4 THE COURT: -- because you don't know.

5 MS. SPROUL: I don't know.

6 THE COURT: But to the extent that they
7 are so classified --

8 MS. SPROUL: Yes.

9 THE COURT: -- the analysis would not
10 include that right of access?

11 MS. SPROUL: It is not a constitutional
12 right of access. It is not a common law right of
13 access. However, what the Judicial Conference has
14 said -- and we're here on 5.15, which is
15 incorporating 26(c), but -- but what we're here on is
16 a -- is a rule that is, in effect -- and I think both
17 of those rules, in effect, embody a preference for
18 disclosure.

19 THE COURT: Um-hmm.

20 MS. SPROUL: And it is just like the
21 balancing that occurs in the Commonwealth. The --

22 THE COURT: So the burden is on the
23 party seeking to seal the documents --

24 MS. SPROUL: That is right.

25 THE COURT: -- applying the good cause

ARGUMENT - MS. SPROUL

Page 14

1 standard --

2 MS. SPROUL: Right.

3 THE COURT: -- and then in forming that
4 judgment by the line of jurisprudence in this
5 circuit that deals with Pansy and the related cases
6 that apply factors to -- to what is good cause and
7 what is not good cause --

8 MS. SPROUL: Right. Yes, Your Honor.

9 THE COURT: -- in discovery -- in
10 discovery issues?

11 MS. SPROUL: In -- in discovery. And
12 Pansy was a settlement --

13 THE COURT: Right.

14 MS. SPROUL: -- agreement issue. But
15 the Pansy court is very explicit in saying that, you
16 know, here, we're giving you some factors. And they
17 were very much driven by the facts in that case. For
18 example, it was a borough on the defense --

19 THE COURT: Yeah, it was a public
20 entity, sure.

21 MS. SPROUL: Yes. And it was a former
22 public employee as a plaintiff. So they said -- they
23 were talking about public officials. But by no
24 means, did they restrict the analysis to public
25 officials --

ARGUMENT - MS. SPROUL

Page 15

1 THE COURT: Yeah.

2 MS. SPROUL: -- as Mr. Cosby suggests.

3 And, in fact, if I might say a word
4 about that, Your Honor?

5 THE COURT: Yeah, please.

6 MS. SPROUL: I --

7 THE COURT: Why don't -- does it make
8 any impact? Does he -- I think Pansy used the word
9 "public figure," but I don't think it meant really
10 public figure. It meant public official.

11 MS. SPROUL: Yeah, they weren't -- Your
12 Honor, they weren't talking about a public official.

13 THE COURT: Yeah.

14 MS. SPROUL: They were talking about a
15 public body, but that doesn't -- that doesn't matter,
16 because what -- what they're also saying is, we're
17 giving you some factors; we're talking about them;
18 we're balancing based on what we see before us. But
19 they say explicitly, this is not an exhaustive list.

20 THE COURT: Yeah. But at least you
21 should start off by checking those off.

22 MS. SPROUL: Yeah.

23 THE COURT: There may be some other
24 factors --

25 MS. SPROUL: Yeah, right.

ARGUMENT - MS. SPROUL

Page 16

1 THE COURT: -- but don't cross out any
2 of these --

3 MS. SPROUL: Right.

4 THE COURT: -- unless they're not
5 relevant.

6 MS. SPROUL: Look at them and balance
7 them.

8 THE COURT: Yeah.

9 MS. SPROUL: Mr. Cosby portrays himself
10 in the brief as an entertainer, a celebrity. He is
11 far more than that. He is an icon, particularly in
12 this city, but he is an icon. He is, you know, a
13 person who has attempted to make a difference in the
14 African American community by reaching out to
15 students, young students. He's written over 20
16 books.

17 THE COURT: So what does that make him?

18 MS. SPROUL: That makes him -- that
19 makes him of great interest to the community. So
20 when the court is analyzing, is this an important
21 dispute --

22 THE COURT: In other words, if he was a
23 person that was not in the public eye in some
24 fashion, the analysis would -- that would -- that
25 would factor into the analysis?

ARGUMENT - MS. SPROUL

Page 17

1 MS. SPROUL: It would factor into it, I
2 think. I think if he had not held himself out as
3 someone who, you know, would guide the public in ways
4 of morality, which he has done, and then to have
5 himself become a defendant in these lawsuits -- and
6 in this particular lawsuit ten years ago, he was
7 being investigated by a District Attorney for an
8 assault.

9 You know, he's a different type of
10 person. I don't know exactly what he is, but he is
11 not a celebrity like someone on a -- you know, a TV
12 show on cable TV. He is someone who has had probably
13 a 50-year career and --

14 THE COURT: Well, that's what I'm asking
15 you. What do we call that, and how do we analyze --

16 MS. SPROUL: Well --

17 THE COURT: -- that? A public person of
18 some sort?

19 MS. SPROUL: Okay.

20 THE COURT: I don't find anything in the
21 cases that address that particularly --

22 MS. SPROUL: There isn't --

23 THE COURT: -- the difference between a
24 public official and a regular person. There is some
25 category in the middle of individuals who have

ARGUMENT - MS. SPROUL

Page 18

1 some -- I guess they call them celebrity sort of
2 thing. They -- they may either bring attention to
3 themselves or -- by the way they act or the way they
4 talk. Kardashians, that type of thing, in other
5 words, what are they? Are they over here, or are
6 they over here?

7 MS. SPROUL: Well, I would -- based on
8 the work that I normally do, Your Honor, I wouldn't
9 venture to characterize the Kardashians. But I
10 represent a lot of defendants in defamation
11 actions --

12 THE COURT: Yeah.

13 MS. SPROUL: -- where the public figure
14 concept comes into play.

15 THE COURT: Yes.

16 MS. SPROUL: And as Your Honor is aware,
17 where there is a public figure, the public figure has
18 to -- has to prove a heightened level --

19 THE COURT: Yeah, but I don't think --
20 that's a constitutional standard, isn't it?

21 MS. SPROUL: Well, yeah, it is.

22 THE COURT: Yeah.

23 MS. SPROUL: But I mean, just to guide
24 your analysis --

25 THE COURT: Well, one thing is whether

ARGUMENT - MS. SPROUL

Page 19

1 or not -- and I think this comes from the defamation
2 law -- whether -- if you inject yourself --

3 MS. SPROUL: Yes.

4 THE COURT: -- in the thrust of the
5 debate --

6 MS. SPROUL: Um-hmm.

7 THE COURT: -- whether at that point,
8 you've given up some privacy.

9 MS. SPROUL: Um-hmm.

10 THE COURT: In other words, you can stay
11 home and don't say anything, but if you say
12 something, then -- then that may open the door or may
13 reduce your right of -- it doesn't eliminate it, but
14 it may limit it.

15 MS. SPROUL: Well, that is what I was
16 getting at, Your Honor --

17 THE COURT: Yeah.

18 MS. SPROUL: -- because that is the test
19 for a public figure, is if someone thrusts themselves
20 into the vortex of some sort of --

21 THE COURT: Yeah.

22 MS. SPROUL: -- controversy, and then
23 there's a legitimate interest in what they're doing.
24 So the press [indiscernible] --

25 THE COURT: So that deals with the

ARGUMENT - MS. SPROUL

Page 20

1 improper purpose of the Pansy analysis?

2 MS. SPROUL: Yes, yes. They're -- and
3 they're -- they're, really -- I mean, as I said at
4 the outset, I don't think there's any way that news
5 coverage should be characterized as an improper
6 purpose.

7 And, you know, this is a matter that is
8 of legitimate public concern because Mr. Cosby is
9 someone who is very notable and has thrust himself
10 into the public eye with respect to issues relating
11 to morality and been very specific and adamant about
12 it, and -- and here he is.

13 And on that note, Your Honor, I would
14 point out that the -- Mr. Cosby has said that the
15 coverage of this latest round of disclosures is,
16 quote, unquote -- a media centerpiece he called it.

17 Even before The AP or anyone, because it
18 wouldn't just be The AP, of course, sees what's on
19 the public docket, if Your Honor puts anything
20 further on the docket -- I don't see how the -- given
21 the media centerpiece this is and the tremendous
22 amount of publicity associated with what has happened
23 recently, the publication of the events of ten years
24 ago and the testimony of ten years ago and nine years
25 ago can make a material difference.

ARGUMENT - MS. SPROUL

Page 21

1 And I don't believe Mr. Cosby, because
2 he hasn't produced any evidence and he hasn't
3 explained anything to you that I've seen, can
4 demonstrate to Your Honor a material difference in
5 what is already out there.

6 And to restrict a public docket in this
7 case because it might embarrass him further is not
8 the standard, cannot be the standard, and should not
9 be the reason that this court restricts the docket
10 because it adds a certain, you know, thumb on the
11 scale, whatever it is.

12 And, also, just to follow up on that,
13 Your Honor, Mr. Cosby has also urged the court to
14 consider the jury pool in Massachusetts. So --
15 obviously, a different district.

16 But even putting that aside, the cases
17 in this court are very clear, the [indiscernible]
18 case and the [indiscernible] case, that the way to
19 deal with that is not to restrict information but to
20 do a very thorough and careful voir dire.

21 So up there in Massachusetts, if they
22 have a trial at some point, the judge there will
23 conduct a voir dire, or the lawyers will, and that
24 will -- that is constitutionally -- the Supreme Court
25 has said it as well, that is the favored approach to

ARGUMENT - MS. SPROUL

Page 22

1 deal with jury [indiscernible] --

2 THE COURT: Well, I think the tainting
3 of the jury concept grew out of the rule of
4 professional conduct that prohibited lawyers -- the
5 efforts to get gag orders and having lawyers talk
6 about the case.

7 I don't know if tainting the jury has
8 ever been connected to the disclosure of discovery
9 material.

10 MS. SPROUL: I have seen that argument,
11 Your Honor.

12 THE COURT: Yeah.

13 MS. SPROUL: And I think in the Sheppard
14 case years ago, Sam Sheppard, who --

15 THE COURT: Right.

16 MS. SPROUL: -- allegedly murdered -- I
17 guess was convicted of murdering his wife, there was
18 a tremendous amount of pretrial publicity --

19 THE COURT: Well, that was -- yeah.
20 Well, that was a criminal case, yeah.

21 MS. SPROUL: Yeah, it was a criminal
22 case.

23 THE COURT: Yeah, yeah.

24 MS. SPROUL: So there was a fair trial,
25 Sixth Amendment right at issue.

ARGUMENT - MS. SPROUL

Page 23

1 THE COURT: Yeah.

2 MS. SPROUL: But, you know -- but the
3 solution in civil cases and criminal cases to any
4 sort of -- and gag orders are part of that -- any
5 sort of --

6 THE COURT: Well, they have to be very
7 carefully tailored.

8 MS. SPROUL: Yes.

9 THE COURT: Yeah. Which we had the
10 issue in this case.

11 MS. SPROUL: Yes. And Your Honor
12 refused --

13 THE COURT: And I denied the gag order.

14 MS. SPROUL: And what you did is what a
15 lot of judges have now done --

16 THE COURT: Yeah.

17 MS. SPROUL: -- following your
18 example --

19 THE COURT: Yeah.

20 MS. SPROUL: -- is to just follow the
21 rules of professional responsibility.

22 THE COURT: That was my recollection of
23 what happened here --

24 MS. SPROUL: It is what you did.

25 THE COURT: -- and everybody seemed to

ARGUMENT - MS. SPROUL

Page 24

1 behave afterwards, yeah.

2 MS. SPROUL: So, you know, that is --
3 that is the way that it goes. So that --

4 THE COURT: Okay. So your bottom line
5 is good cause -- plaintiff has failed to show good
6 cause, and good cause is informed by the application
7 of Pansy factors, and in this case, we don't have
8 affidavits, we don't have anything of what the
9 plaintiff says and that he has not identified -- has
10 not defined specific injury in this. It is somewhat
11 speculative what would happen here. You don't know
12 because you don't know what's in the documents.

13 MS. SPROUL: That is right, yes. And
14 just to put a --

15 THE COURT: Yeah.

16 MS. SPROUL: -- final point on it, Your
17 Honor, I would like to urge that the review has to be
18 done on a document-by-document basis --

19 THE COURT: So some documents --

20 MS. SPROUL: -- [indiscernible] page by
21 page --

22 THE COURT: -- would fall one way, and
23 some the other way?

24 MS. SPROUL: And page by page, as you
25 did with one of the transcripts of a hearing that you

ARGUMENT - MS. SPROUL

Page 25

1 had. You redacted two pages from it that are still
2 under seal.

3 THE COURT: Do you think there is a
4 difference between a deposition of a party and either
5 depositions or statements or materials from
6 non-parties?

7 MS. SPROUL: I don't, unless someone
8 demonstrates to you that there is a reason. I think
9 the content is the issue. It's not necessarily --

10 I mean, and there are no third parties
11 here to tell the court how they feel about it. And
12 they may be -- I don't know who they are. They may
13 be the plaintiffs in the Massachusetts case. They
14 may be some of the other, I believe more than 20,
15 women who have made statements in the press.

16 So I -- to answer your question -- and I
17 wish I could answer it more directly --

18 THE COURT: Okay. You would need to
19 know what it is?

20 MS. SPROUL: -- I need to know what it
21 is, yeah.

22 THE COURT: Okay. Well, thank you.

23 MS. SPROUL: Thank you.

24 THE COURT: We'll give you a chance to
25 reply here.

ARGUMENT - MR. GOWEN

Page 26

1 MS. SPROUL: Okay.

2 THE COURT: Mr. Gowen, please.

3 MR. GOWEN: Thank you, Your Honor.

4 May it please the court. My name is
5 George Gowen, and I represent the defendant.

6 Your Honor, we've had some discussion
7 already, but I think because this case ended so long
8 ago, it might be helpful just to set the stage and
9 remember where we were, which was a dispute between
10 individuals, not between public officials or
11 involving a public official, not even public
12 companies, not involving the government.

13 One of those individuals happens to be a
14 celebrity. The dispute was about the personal
15 components of his relationships, nothing that had
16 been injected into the public eye.

17 The parties engaged in private pretrial
18 discovery, and before too long, they decided to
19 settle their dispute. And they decided to settle it
20 before it became public, before it left the
21 traditionally private discovery phase, and they did
22 so with an agreement in which they agreed to keep the
23 discovery they had learned through the case
24 confidential forever.

25 Now, The AP, many years later, would

ARGUMENT - MR. GOWEN

Page 27

1 like the court to unseal a few of the discovery
2 motions and associated briefs that were filed in that
3 case under seal before it was settled.

4 As we just heard and, certainly, as we
5 see in the brief, The AP quotes relies upon, even
6 quotes itself, in the well-known authority supporting
7 and encouraging judicial openness and public scrutiny
8 of the judicial process.

9 But it's worth noting that in the over
10 eight years since this case was settled, The AP did
11 nothing to champion those causes in this case. Now
12 it comes forward, and it does so by its own
13 admission, because a new crop of scandalous
14 allegations have been lodged against the defendant
15 and a new barrage of tabloid-style media publicity
16 has followed.

17 So to be clear, The AP wants these
18 records unsealed not because it wants to inspect the
19 particulars of the judicial process in this case, but
20 because it wants to sell a story about a celebrity
21 scandal.

22 When you look at The AP's brief, at
23 least -- we heard some more today, but when you look
24 at the brief, the brief would suggest that the
25 analysis is very simple.

ARGUMENT - MR. GOWEN

Page 28

1 The AP argued in its brief that the
2 public simply has a right to see everything that is
3 ever filed with a court and that the court's analysis
4 has to begin with a strong presumption that the
5 material -- all material becomes unsealed and it's up
6 to defendant to make a strong showing to overcome --

7 THE COURT: Well, isn't that law?

8 MR. GOWEN: No, Your Honor. It's not.
9 The AP went on at length about the Leucadia case, and
10 the Leucadia case, which --

11 THE COURT: So you think that the burden
12 of proof is on The AP?

13 MR. GOWEN: No, no. I didn't mean to
14 say that, Your Honor.

15 THE COURT: Okay.

16 MR. GOWEN: What Leucadia said --

17 THE COURT: Well, there's no
18 presumption. I think we agree with that.

19 MR. GOWEN: Okay.

20 THE COURT: We don't have to spend a lot
21 of time.

22 The question is -- on the 26(c), I think
23 that the party seeking to seal has the burden of
24 proof, and that's what you're here to show.

25 MR. GOWEN: You're right, Your Honor. I

ARGUMENT - MR. GOWEN

Page 29

1 merely meant to make the point, as is made very clear
2 in the Hecht [ph] case, which was decided after this
3 case ended, that that analysis, which, of course, we
4 bear the burden of leading, occurs on a blank slate.

5 THE COURT: Right.

6 MR. GOWEN: It doesn't occur amidst the
7 presumption of openness. It occurs on a blank slate.

8 THE COURT: I agree.

9 MR. GOWEN: Okay. And the factors to be
10 considered, certainly the factors that must be
11 considered -- and there may be others -- are
12 announced in Pansy and [indiscernible] --

13 THE COURT: Okay. Good. Let's get to
14 those.

15 MR. GOWEN: And we checked through those
16 factors in our brief, and I'm ready to do that here,
17 because blank slate or not, none of the factors in
18 Pansy ways in favor of unsealing here.

19 The first one is privacy. Pansy asked,
20 will unsealing and not protecting the documents
21 violate privacy interests?

22 THE COURT: So what is the clearly
23 defined specific and cognizable injury that the
24 plaintiff claims -- that -- I'm sorry -- that
25 defendant claims?

ARGUMENT - MR. GOWEN

Page 30

1 MR. GOWEN: Well, first, we claim that
2 the material at issue here is private. So just to
3 check off that factor, it's private. These are
4 not -- this is not questions and answers about
5 accounting records or a business dispute.

6 THE COURT: But what is the injury?

7 MR. GOWEN: Well, the injury, Your
8 Honor, would be embarrassment and a violation of --

9 THE COURT: Well, every case involving
10 sex or drugs involves some measure of embarrassment.
11 So the question is, what is the specific injury?

12 Those subjects in the Complaint, for
13 example --

14 MR. GOWEN: Right.

15 THE COURT: -- is the embarrassing.

16 MR. GOWEN: Right. But -- but --

17 THE COURT: It doesn't mean it's true,
18 but it's embarrassing to be accused of those kinds of
19 things. Nobody would like to be accused of them,
20 even if one is completely innocent.

21 So the question, I think, that the case
22 law asks is -- that's sort of general embarrassment.
23 You wouldn't want to be accused of that. But in your
24 case, what is the defined, specific, and cognizable
25 injury? What is going to happen if this material is

ARGUMENT - MR. GOWEN

Page 31

1 released?

2 MR. GOWEN: Well, the big difference,
3 Your Honor, is, first of all, we're talking about
4 specifics now. We're no longer analyzing the
5 abstract. And I understand The AP is at a
6 disadvantage.

7 THE COURT: Right.

8 MR. GOWEN: But Your Honor is not, and
9 we are not. We are not talking about abstract
10 principles, as we were earlier in the case. We now
11 have specifics. We have pages -- separated into
12 pages --

13 And, most importantly, getting at Your
14 Honor's point, we're not talking about what someone
15 else says about defendant. We're talking about what
16 defendant himself has said --

17 THE COURT: Um-hmm.

18 MR. GOWEN: -- and we're talking about
19 things that defendant said at a deposition in
20 testimony that was elicited from him. These are not
21 subjects that he has injected into the public.

22 And while it would defeat the purpose of
23 today's proceeding and our argument here to talk
24 about the specifics here --

25 THE COURT: Right. I appreciate that.

ARGUMENT - MR. GOWEN

Page 32

1 MR. GOWEN: -- I would note that if
2 these subjects are not embarrassing, it is hard to
3 imagine what the Pansy court would think would be
4 embarrassing.

5 And, in fact, I have to add, The AP, as
6 it did today and in its brief, agrees that the
7 subject matter generally is embarrassing.

8 And, in fact, Your Honor noted early in
9 the case that unlike perhaps an accounting case, this
10 is the sort of case that could lead to embarrassing
11 discovery, but any protection would have to be over
12 specific material specifically shown to be
13 embarrassing.

14 And, again, that's what we have here.
15 We have specifics. They are embarrassing. And,
16 again, The AP seems to agree but only to say, well,
17 gee, the guy's been embarrassed so much about what
18 other people have said -- by what other people have
19 said about him, this shouldn't matter at all; let's
20 just let this stuff out, and let's let everyone see
21 what he was forced to say.

22 Well, that -- frankly, it's offensive,
23 but more importantly, it doesn't make any sense, Your
24 Honor. Again, we're talking about the defendant's
25 own testimony elicited from him at a deposition by

ARGUMENT - MR. GOWEN

Page 33

1 opposing counsel about very embarrassing subjects.

2 And you're right. While they're not
3 here and we don't know whether they know about this,
4 the questions and answers also --

5 THE COURT: Well, now, that's
6 interesting that you mentioned that, because I was
7 thinking of that, that taking one aspect of the
8 materials which are under seal, which have been
9 identified as portions of his deposition, he -- you
10 said, "he was forced to."

11 I mean, he was asked questions, and he
12 gave answers. He had a lawyer present. He was under
13 oath. There was vigorous back-and-forth as to what
14 those questions should be and what they meant.

15 Isn't that his own version of the facts?
16 Why would he be embarrassed by his own version of the
17 facts?

18 MR. GOWEN: Your Honor, it's hard,
19 again, to answer the question without defeating the
20 purpose, so perhaps --

21 THE COURT: Right.

22 MR. GOWEN: -- I could use a
23 hypothetical --

24 THE COURT: Yes, please.

25 MR. GOWEN: -- and just talk about me?

ARGUMENT - MR. GOWEN

Page 34

1 THE COURT: Yeah.

2 MR. GOWEN: There's a lot in my personal
3 life that is my version of the facts and is true, but
4 I don't want anyone to know about it because it would
5 be embarrassing. And I don't want anyone to know,
6 even if it's one person.

7 If this material comes out, everyone
8 will know about it. It would be terribly
9 embarrassing for this material to come out.

10 And that brings me to another point,
11 about a declaration. Your Honor, we'd be very happy
12 to submit a declaration about this, but, frankly,
13 reading the authority, I don't think it would add
14 much.

15 Embarrassment, obviously, is subjective.
16 Of course, Mr. Cosby can submit an affidavit that
17 says, this will be embarrassing to me, and we can
18 explain why, but it really is up to the court to
19 decide whether it should be embarrassing.

20 THE COURT: Okay.

21 MR. GOWEN: I submit that if you look at
22 this material, the court will conclude that it is.

23 THE COURT: Um-hmm.

24 MR. GOWEN: Now --

25 THE COURT: Yes. Go ahead. I'm sorry.

ARGUMENT - MR. GOWEN

Page 35

1 MR. GOWEN: Okay.

2 THE COURT: Now, privacy and
3 embarrassment seem to be somewhat conflated. Are
4 they -- is there a difference between the two?

5 MR. GOWEN: Well, in this case, no,
6 probably, because it's embarrassing because it's
7 private.

8 THE COURT: Okay.

9 MR. GOWEN: I think that Pansy --

10 THE COURT: Um-hmm.

11 MR. GOWEN: -- imagined the distinction,
12 but here, they really run together.

13 THE COURT: Now, what about this
14 argument that he may be somewhere between a public
15 official and a private person -- that is, a person
16 who's not only an entertainer but who also has opined
17 on matters of public interest -- and that, therefore,
18 the public -- there would be a proper inquiry whether
19 the individual opining in matters of public interest,
20 morality, et cetera -- about, you know, his
21 background, et cetera, which may not be the same as
22 you or -- or me, perhaps, if we had some private
23 matters?

24 If I go out there and I talk about a --
25 you know, morality, would it be -- would that weigh

ARGUMENT - MR. GOWEN

Page 36

1 in the balance here?

2 MR. GOWEN: No, Your Honor. And I admit
3 it's an interesting concept, but the answer is no.
4 And to conclude that, you need go no further than The
5 AP's brief. They make this argument in one half-
6 hearted sentence at the end of their brief, and they
7 offer no authority, because there is no authority,
8 and we provide authority which holds the opposite.

9 THE COURT: Which one? Which is your
10 authority here?

11 MR. GOWEN: I can run back to --

12 THE COURT: Well, I think you had a case
13 of some -- yeah --

14 MR. GOWEN: There was one about Prince.

15 THE COURT: -- a rapper or something
16 who's deposition --

17 MR. GOWEN: Right.

18 THE COURT: -- was kept under seal from
19 the district court somewhere. Yeah.

20 MR. GOWEN: And then there was a case
21 against, I believe, Gary Condit, who actually was a
22 public official.

23 THE COURT: Right.

24 MR. GOWEN: And --

25 THE COURT: Well, he was a public

ARGUMENT - MR. GOWEN

Page 37

1 figure.

2 MR. GOWEN: -- the court noted, mere
3 celebrity interest here isn't -- this isn't just
4 about mere celebrity interest.

5 THE COURT: Yeah.

6 MR. GOWEN: The point being that it has
7 to be more than that. And that makes sense if you
8 look at what I'll call the public interest factors in
9 Pansy and the other cases.

10 When you read the context in which those
11 are articulated and, most importantly, when you read
12 the citations Pansy uses to articulate those factors,
13 it's very clear Pansy is talking about public in
14 the not only defamation sense but in the governmental
15 sense; public officials, the use of public funds, the
16 workings of government.

17 Mere celebrity here doesn't make this
18 case or any one person public for the Pansy sense of
19 the word.

20 THE COURT: Yeah. Okay.

21 MR. GOWEN: A word -- could I offer a
22 word about the settlement issue?

23 THE COURT: Yeah, that's -- I'd like
24 to -- you know, I mean, proceed through the factors.
25 I don't mean to cut you off here.

ARGUMENT - MR. GOWEN

Page 38

1 MR. GOWEN: Pansy mentions settlement as
2 a factor --

3 THE COURT: Yeah.

4 MR. GOWEN: -- and, certainly, it -- it
5 offered a rather hypothetical notion that parties
6 will settle anyway. But let's talk about this case.

7 Again, this case was between private
8 individuals, and they ended it before it became
9 public, and they ended it avoiding the publicity and
10 embarrassment that a trial would bring. And they
11 entered into an agreement keeping everything
12 confidential.

13 Now, if key portions --

14 THE COURT: Well, keeping everything
15 confidential, what does that mean?

16 MR. GOWEN: Well, they --

17 THE COURT: In other words, did they --
18 they didn't come to the court and ask to seal
19 anything.

20 MR. GOWEN: Well, we did, Your Honor. I
21 know what Your Honor means. We -- defendant did, and
22 there was an interim sealing order --

23 THE COURT: Right.

24 MR. GOWEN: -- which took place when the
25 case ended.

ARGUMENT - MR. GOWEN

Page 39

1 And you're right, and as The AP says, we
2 can't rely -- merely by settling, we can't rely on
3 the courts keeping that under seal forever.

4 But we did everything we could. So did
5 the plaintiff. And, more importantly, there is no
6 public right of access to discovery documents.

7 THE COURT: Right.

8 MR. GOWEN: And here, we otherwise --

9 THE COURT: Well, but the court never
10 decided whether or not these documents should be
11 sealed.

12 What it said, as I understand it from my
13 own writing, is, let's stop; let's gather the
14 documents; and then we'll make a decision.

15 That decision was never made. That's
16 what we're doing now.

17 MR. GOWEN: Right.

18 THE COURT: In a sense, we're rolling
19 the -- we're turning the clock back to eight years
20 ago and trying to decide whether or not this
21 should -- should be sealed.

22 MR. GOWEN: Right.

23 THE COURT: So two things should have
24 happened. Either the courts should have made that
25 determination back then, or the parties should have

ARGUMENT - MR. GOWEN

Page 40

1 asked the court, we have a confidentiality agreement,
2 Judge; we want you to seal all the discovery
3 materials. And then we could have done a Pansy
4 analysis and then decide one way or the other, I
5 think, in which case, then reliance would have been
6 much greater.

7 The court -- you told us this was going
8 to be sealed, and now somebody comes in and wants to
9 unseal it.

10 MR. GOWEN: Understood, Your Honor.

11 THE COURT: Yeah.

12 MR. GOWEN: And that didn't happen, and
13 perhaps in retrospect, it should have.

14 THE COURT: Um-hmm.

15 MR. GOWEN: However, what I'm trying to
16 say now is -- and it pertains only to this case and
17 not the hypothetical imagined in Pansy -- if we had
18 been asked at the time whether -- would you settle if
19 you know all this stuff is going to get out, the
20 answer would be, I'm not so sure I want to settle.

21 THE COURT: It would have -- it would
22 have discouraged you.

23 MR. GOWEN: It would have discouraged
24 the settlement --

25 THE COURT: Um-hmm.

ARGUMENT - MR. GOWEN

Page 41

1 MR. GOWEN: -- in a very big way.

2 And so what you have here is -- merely
3 because something was included in a routine discovery
4 motion in a case that never went to trial, you
5 have --

6 THE COURT: No. Well --

7 MR. GOWEN: -- [indiscernible] --

8 THE COURT: Let me ask you about that,
9 because when you have your deposition taken, wouldn't
10 you anticipate that that would work its way, through
11 summary judgment or trial, into the public?

12 In other words, is [sic] the taking of a
13 deposition, which is taken in private, give you some
14 assurances that that will not get out into the public
15 arena at some point in the future unless you settle
16 the case and you get a sealing order?

17 So is your reliance affected by --
18 certainly, by the legal prospect that this may come
19 out in the regular course of -- of the trial?

20 MR. GOWEN: Your Honor, let me slip into
21 hypotheticals a little bit.

22 THE COURT: Yeah.

23 MR. GOWEN: But absolutely. You can
24 imagine a party beginning a case. Discovery, The
25 Seattle Times says, is private, and the depositions

ARGUMENT - MR. GOWEN

Page 42

1 unfold.

2 And that party could say, boy, we better
3 settle this thing; we think the other side is wrong,
4 but the publicity and embarrassment that would follow
5 a public trial or a summary judgment motion wouldn't
6 be worth the victory, so we better settle this, and
7 now is the time to do it because we're in discovery;
8 The Seattle Times says it's private; I'm sure the
9 other side will agree, if we stop it now, nothing
10 becomes public.

11 And you're right. We can't technically
12 rely on the courts not unsealing some discovery
13 motions that have been filed, but those are -- we go
14 right back to the analysis. Those are just discovery
15 motions.

16 THE COURT: Yeah.

17 MR. GOWEN: There's no right of access
18 to them. Disclosing them would serve no public good,
19 the public in the Pansy sense of the word, and yet,
20 it would cause terrible embarrassment and invading
21 the privacy.

22 So, again, just conclude, it would
23 undermine the settlement here, and it would
24 [indiscernible] future settlements in similar cases.

25 THE COURT: Um-hmm. What about tainting

ARGUMENT - MR. GOWEN

Page 43

1 of the jury pool? What do you think of that?

2 MR. GOWEN: I was surprised when I read
3 in The AP's brief that there's no more jury pool to
4 taint because, of course, we have this case in
5 Massachusetts pending against Mr. Cosby.

6 And, again, that showing has to be
7 specific, but again, we now have specifics for the
8 court to look at, which, frankly, for the same
9 reasons that they would be embarrassing, would also
10 prejudice him in the eyes of the jury pool in
11 Massachusetts.

12 THE COURT: Um-hmm.

13 MR. GOWEN: Another word, Your Honor, if
14 you don't mind?

15 THE COURT: Yeah, please.

16 MR. GOWEN: I don't want to interrupt
17 your train of thought, but with respect to redaction,
18 with respect to the notion that not every single word
19 in a discovery motion can meet the balancing test,
20 obviously, that's true.

21 And that's the reason -- I don't fault
22 Ms. Sproul for not knowing this -- we did submit
23 redacted copies of everything here. We did early on,
24 when this was at issue in the case, and we filed a
25 brief in opposition to the lifting of the seal. And

ARGUMENT - MR. GOWEN

Page 44

1 we called it a partial opposition to the lifting of
2 the seal. We submitted to the court redacted copies.

3 Now, as I stand here today, with nine
4 years having lapsed and what I would think any public
5 interest in these materials having lapsed with it, I
6 don't think the court necessarily needs to go through
7 that, because there is no right of access, there are
8 no factors supporting disclosure, and there are lots
9 of factors encouraging sealing.

10 But if the court is inclined to do that,
11 we have the redactions in the file, and what I would
12 simply ask is, now that the time has gone by, that we
13 get a chance to make sure we've done everything and
14 redacted everything that was filed and provide you
15 with that.

16 So if that is the sort of -- I think it
17 would be an unnecessary use of judicial resources,
18 but if that's what the court wants --

19 THE COURT: Now, would that be as to
20 each and every document or as to the deposition or --
21 or --

22 MR. GOWEN: Well, the way it played out,
23 Your Honor -- and it was according to a terrific
24 procedure that --

25 THE COURT: Yeah.

ARGUMENT - MR. GOWEN

Page 45

1 MR. GOWEN: -- that the court
2 promulgated -- the pages of the depositions, I don't
3 believe -- perhaps with an exception or two, weren't
4 themselves attached, but rather, the parties retyped
5 them. They produced them verbatim.

6 And often, and just as troubling here,
7 they characterized them. Okay? So you have
8 characterizations and cites to the record, and you
9 also have verbatim repetitions of testimony in the
10 motions itself.

11 THE COURT: Well, the depositions
12 is [sic] questions and answers --

13 MR. GOWEN: Right.

14 THE COURT: -- and then there's a
15 back-and-forth by the lawyers.

16 MR. GOWEN: Right.

17 THE COURT: The back-and-forth probably
18 no -- no role here. It really only would be -- be
19 that, unless you think that the back-and-forth put
20 the answers in context.

21 MR. GOWEN: That's it, Your Honor. When
22 we went through and redacted -- and, again, I'd like
23 a chance --

24 THE COURT: Yeah.

25 MR. GOWEN: -- to double check, we

ARGUMENT - MR. GOWEN

Page 46

1 didn't redact back-and-forth about, you know, the
2 form of a question or something like that or some of
3 the really [indiscernible] stuff.

4 THE COURT: Would -- let me ask you to
5 clarify it. And I think you -- is it document 63
6 that has some attachments? Is that -- is that what
7 you're saying that you -- that you redacted?

8 MR. GOWEN: We took, Your Honor, if
9 memory serves -- and, again, I'd like to double check
10 this. We took plaintiff's motions for sanctions,
11 plaintiff's motion to compel, defendant's motion to
12 compel, plaintiff's motion to compel The National
13 Enquirer, all --

14 THE COURT: Yeah, I think -- excuse me
15 for interrupting you, but I think you -- yeah, I'm
16 looking at 63, Memorandum of Law in Partial
17 Opposition to the Lifting of the Seal. Is that the
18 one? Okay.

19 MR. GOWEN: Is that which one, Your
20 Honor?

21 THE COURT: That's 63.

22 MR. GOWEN: That's a brief that we
23 filed --

24 THE COURT: Right, Memorandum of Law in
25 Part -- but I think it had -- it had attachments.

ARGUMENT - MR. GOWEN

Page 47

1 And maybe that's what you're referring to. Those
2 attachments had the redactions.

3 MR. GOWEN: Yes, Your Honor. I'm sorry.

4 THE COURT: Okay.

5 MR. GOWEN: I misunderstood. With that
6 brief --

7 THE COURT: Yeah.

8 MR. GOWEN: -- we submitted redacted
9 copies of, I think, all of the other briefs, all of
10 the other motions and briefs.

11 THE COURT: Oh, okay.

12 MR. GOWEN: So in that brief, which
13 itself was under seal and which itself we redacted
14 and submitted to the court, we argued if the court
15 would be more comfortable proceeding this way, we
16 have proposed redacted copies of all of the discovery
17 motions, thus limiting the sealing to the portions of
18 those papers that meet the balancing test.

19 THE COURT: Okay. I think I -- I follow
20 that.

21 MR. GOWEN: Okay.

22 THE COURT: Okay. Bottom line?

23 MR. GOWEN: The bottom line, Your Honor,
24 is that --

25 THE COURT: You think you've met good

ARGUMENT - MS. SPROUL

Page 48

1 cause?

2 MR. GOWEN: We do, Your Honor. We do,
3 Your Honor. I think it's very clear if you look at
4 even the first couple of pages of plaintiff's motion
5 for sanctions or plaintiff's motion to compel. There
6 is no presumption of openness here. We're on a blank
7 slate.

8 THE COURT: Right.

9 MR. GOWEN: And there are factors in
10 favor of sealing and zero factors under the Pansy
11 analysis in favor of unsealing.

12 And the concepts that have been offered
13 by The AP are novel, without authority. Opening
14 these documents would serve no sanctioned public good
15 and would cause terrible impairment.

16 THE COURT: Okay. Thank you, Mr. Gowen.

17 MR. GOWEN: Thank you, Your Honor.

18 THE COURT: Okay. Let me ask counsel,
19 Ms. Sproul, if you would like a rebuttal.

20 MS. SPROUL: Thank you, Your Honor.
21 Just a couple of points.

22 There are under seal two pages of a
23 transcript --

24 THE COURT: Right.

25 MS. SPROUL: -- of a hearing that the

ARGUMENT - MS. SPROUL

Page 49

1 court held on one or two or three of the motions.
2 There is a different standard for proceedings held in
3 court. The closure --

4 THE COURT: Yeah, there's a transcript.

5 MS. SPROUL: Yeah.

6 THE COURT: There are two pages of a
7 transcript --

8 MS. SPROUL: 8 and 9, pages 8 and 9.

9 THE COURT: -- that are here somewhere.
10 We do have them. Yeah. Okay. So that -- that would
11 be --

12 MS. SPROUL: That would be a
13 constitutional standard.

14 THE COURT: That would be a court --
15 court document. Okay.

16 MS. SPROUL: Yes. And that would be --
17 it's a judicial record. There would be a
18 presumption.

19 THE COURT: Yes.

20 MS. SPROUL: You know, we don't agree
21 that the law is that there's no -- there's no favor
22 either way for sealing or non-sealing.

23 We believe it's clear, even putting
24 aside the common law and the constitutional tests,
25 that Rule 5.15 embodies the court's dedication to the

ARGUMENT - MS. SPROUL

Page 50

1 proposition that court proceedings should be held in
2 the open unless there is good cause, and it is the
3 defendant's burden to show it in this case because he
4 wants the sealing.

5 We have never said that everything
6 should be accessible. We understand there is
7 something that is called good cause and sometimes it
8 can be met. We are just saying that from what we
9 see, it isn't met here.

10 The fact that Mr. Cosby sat at his
11 deposition and gave testimony and gave his version of
12 the facts does not, you know, visit upon him a
13 particular injury. In fact, it's his story. It's
14 what he's saying to defend himself. And we can't
15 really roll back the clock and pretend that this
16 happened nine years ago because so much has happened
17 in between.

18 And, in fact, the Green case in
19 Massachusetts is a defamation case that arises from
20 the fact that Mr. Cosby went out to the press and
21 talked about this and defended himself and gave his
22 version of the facts.

23 So, you know, how does that hurt -- how
24 does this hurt him, the fact that his deposition will
25 somehow -- parts of his deposition will come out? I

ARGUMENT - MS. SPROUL

Page 51

1 don't know what those parts are. I don't see that as
2 the particularized, specific, clearly demonstrated
3 injury that the Third Circuit specifically requires
4 here.

5 Just to say it's a sexual nature -- the
6 information is of a sexual nature and, therefore,
7 it's embarrassing, that's not enough. You know, it
8 has to be explained.

9 Because if it's already out there and if
10 it's already in the public eye -- and I believe it
11 is; obviously, I can't attest to it because I don't
12 know what specifically he said -- then there's no
13 basis for keeping it secret in this court, especially
14 because this is a court.

15 And that brings me to the Condit case
16 and the Prince case that were cited in Mr. Gowen's --

17 THE COURT: Where the -- where the
18 depositions were sealed?

19 MS. SPROUL: Yeah. Those were not --
20 those did not arise from matters that had been filed
21 in court.

22 In other words, the deposition
23 transcripts -- and I believe in the Condit -- no, it
24 wasn't the Condit. In the Prince case, I don't know
25 if he had actually given his deposition yet.

ARGUMENT - MS. SPROUL

Page 52

1 But in the Condit case, the deposition
2 that was at issue in that case was Dominick Dunne's
3 deposition. Dominick Dunne at the time -- he's now
4 deceased -- had a show --

5 THE COURT: Right.

6 MS. SPROUL: -- on cable TV, and he
7 talked about Gary Condit and Chandra Levy, and he
8 gave the whole story from his perspective. He was
9 sued by Gary Condit.

10 And so he was the defendant, and he was
11 going to give a deposition, and he wanted -- and he
12 gave a deposition, and he wanted it to be sealed.
13 And the court refused to seal it.

14 Now, I'm not really sure why they cited
15 that case, but it's true they said some things in the
16 course --

17 THE COURT: You mean before the
18 deposition was taken?

19 MS. SPROUL: No. The deposition was
20 actually taken in that case, had been taken, and he
21 wanted it under seal because the plaintiff's lawyer,
22 Gary Condit's lawyer, Lin Wood, said -- said to
23 someone in the Daily News in New York something about
24 maybe distributing the transcript of the deposition.

25 And Dominick Dunne was enraged and

ARGUMENT - MS. SPROUL

Page 53

1 didn't want that to happen, so he moved for a
2 sealing -- he moved for an order to seal.

3 But it wasn't an issue where the
4 deposition transcript or portions of it had been sent
5 to the court to evaluate a motion separately.

6 THE COURT: Well, now, the
7 confidentiality agreement that was entered into in
8 this case was not presented to the court, but is that
9 confidentiality agreement within the scope of this
10 case?

11 Is that -- is that something in this
12 case even though it was -- you know, occurred outside
13 of the case? Is the deposition transcript of this
14 case, perhaps other deposition transcripts that might
15 have been taken in this case, which are not in the
16 record of the -- of the -- that is, not in the
17 clerk's office -- are those within the scope of this
18 case that the court would have authority to either
19 cloak them in some kind of a protective order or
20 order their production?

21 MS. SPROUL: I guess I have two answers
22 for that.

23 One is that I believe the court has some
24 authority in that regard because of the Pansy case,
25 because, as Your Honor will recall, the settlement

ARGUMENT - MS. SPROUL

Page 54

1 agreement was not filed of record in that case and
2 the court made a determination that it could not be
3 sealed even --

4 There was a corollary proceeding going
5 on there in Pansy. There was a right to know action
6 in the state court in Pennsylvania at the same time
7 by the newspaper seeking that settlement agreement.

8 And the court said, we're not going to
9 allow that agreement to be sealed. And that made it
10 accessible through the right to know case that was
11 proceeding on the side.

12 And so the court made a determination
13 with respect to that settlement agreement even though
14 it wasn't in the court file. There were two grounds
15 for them -- for the court's actions.

16 And so in -- in this case -- and we're
17 not asking the court to order the defendant or the
18 plaintiff to allow The Associated Press to see
19 unfiled discovery. That's The Seattle Times case.
20 We're not asking for that.

21 What we're asking for is what has been
22 filed with the court because that has a different
23 character, different personality, different judicial
24 importance. And in this case, what we're asking the
25 court to do is to look at these documents to see

ARGUMENT - MR. GOWEN

Page 55

1 whether there is actually an affirmative injury that
2 will arise from them.

3 THE COURT: Okay.

4 MS. SPROUL: And it may not -- you know,
5 with the passage of time, it may not be as it once
6 was nine years ago.

7 THE COURT: Okay. Thank you.

8 Mr. Gowen, please.

9 MR. GOWEN: Brief rebuttal, Your Honor?

10 THE COURT: Yeah, sure.

11 MR. GOWEN: Just very briefly.

12 Defendant never commented in public
13 about this case or about the subjects covered in the
14 depositions we're talking about today. That just
15 never happened.

16 It's -- counsel mentioned transcripts,
17 judicial proceedings versus [indiscernible] --

18 THE COURT: Is that -- you said he never
19 commented about this case in public?

20 MR. GOWEN: Not publicly, Your Honor.

21 There's no -- there's --

22 THE COURT: I thought in the -- I
23 thought there had been -- and my memory may not be
24 accurate, but I thought part of the debate during the
25 sanctions process was an interview that he had given

ARGUMENT - MR. GOWEN

Page 56

1 to The National Enquirer about the facts of the case.

2 MR. GOWEN: Not this case, Your Honor.

3 That was about something else. And that's an
4 important distinction.

5 The cases don't distinguish between
6 discovery motions, meaning the paper portion of it,
7 and the transcripts around them. The cases, because
8 of Seattle Times, make a broad exception to the
9 common law right of access to discovery motions.

10 THE COURT: Um-hmm.

11 MR. GOWEN: There's no authority to
12 suggest that the transcripts deciding those motions
13 is different from the motions -- the pieces of paper
14 arguing them.

15 There is no authority for the idea that
16 Mr. Cosby, because of what he has done, meets the
17 public interest factors announced in Pansy.

18 The Condit case may be distinguishable,
19 as counsel mentions, but they have no authority for
20 their argument, their chief argument here, that
21 because of Mr. Cosby's status and who he is, he
22 deserves less of the privacy and embarrassment
23 factors announced in Pansy. There's just no
24 authority for that, Your Honor.

25 Thank you.

Page 57

1 THE COURT: Okay. Very well. I think
2 everything has been said. If not -- by everybody,
3 and I will take the matter under advisement and will
4 get back to you.

5 MR. GOWEN: Thank you, Your Honor.

6 THE COURT: Okay. Thank you.

7 COURTROOM DEPUTY: All rise.

8 - - -

9 (Whereupon, the proceeding was concluded
10 at 10:58 a.m.)

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Page 58

1 C E R T I F I C A T I O N
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5 I, Judi Y. Olsen, Registered
6 Professional Reporter, do hereby certify that the
7 foregoing is a true and correct transcript from the
8 electronic sound recordings of the proceedings in the
above-captioned matter.

9
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11
12



13 June 29, 2015

14 Date

Judi Y. Olsen, RPR

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[& - authority]

Page 1

		888 1:25	agreement 3:23 8:19 8:21,23 9:5,12,16 9:18 14:14 26:22 38:11 40:1 53:7,9 54:1,7,9,13	applying 13:25 appreciate 31:25 approach 6:13 21:25
		9	agreements 10:13	arena 41:15 argued 28:1 47:14 argues 3:22,24 6:11 arguing 5:21 6:8,9 56:14
		9 49:8,8	allegedly 22:16 ahead 34:25 allegations 27:14	argument 2:3 6:4 7:24 8:20 22:10 31:23 35:14 36:5 56:20,20
		988-9778 1:11	allow 54:9,18 amendment 4:16 22:25	arises 50:19 arrangement 9:15 articulate 37:12 articulated 37:11 aside 21:16 49:24
		a	american 16:14 amidst 29:6 amount 20:22 22:18 analysis 5:25 12:23 13:9 14:24 16:24,25	asked 29:19 33:11 40:1,18 asking 5:10 8:11 17:14 54:17,20,21 54:24
		a.m. 1:5 57:10	18:24 20:1 27:25 28:3 29:3 40:4 42:14 48:11	asks 30:22 aspect 33:7 assault 4:5 17:8 assertions 4:7
		able 4:17	analyze 17:15 analyzing 16:20 31:4	associated 1:9 3:10 20:22 27:2 54:18
		absolutely 41:23	andrea 1:3 announced 29:12 56:17,23	assuming 6:3,4 assurances 41:14
		abstract 31:5,9	answer 25:16,17 33:19 36:3 40:20	atlantic 1:23 attached 45:4 attachments 46:6,25
		access 10:19 12:21 13:10,12,13 39:6 42:17 44:7 56:9	answers 30:4 33:4 33:12 45:12,20 53:21	47:2
		accessible 50:6 54:10	anticipate 41:10 anyway 38:6	attempted 16:13 attempts 4:10
		accounting 30:5 32:9	ap 4:11 20:17,18 26:25 27:5,10,17 28:1,9,12 31:5 32:5 32:16 39:1 48:13	attention 18:2 attest 51:11 attorney 17:7
		accurate 55:24	ap's 27:22 36:5 43:3	audio 1:16 authority 4:13 11:19 27:6 34:13 36:7,7,8,10 48:13 53:18,24 56:11,15
		accused 4:5 30:18 30:19,23	apparently 11:6	
		act 18:3	appearances 1:8	
		action 54:5	application 24:6	
		actions 18:11 54:15	apply 11:19,20 12:13,21 14:6	
		adamant 20:11		
		add 32:5 34:13		
		addition 9:8		
		address 17:21		
		adds 21:10		
		admission 27:13		
		admit 36:2		
		admitted 2:12		
		advancement 57:3		
		affidavit 34:16		
		affidavits 24:8		
		affirmative 55:1		
		african 16:14		
		ago 17:6 20:24,24 20:25 22:14 26:8 39:20 50:16 55:6		
		agree 9:16 12:20,22 28:18 29:8 32:16 42:9 49:20		
		agreed 9:23 10:25 26:22		

[authority - concluded]

Page 2

56:19,24	briefly 55:11	42:24 56:5,7	claim 30:1
available 8:16	briefs 6:19 7:23	category 17:25	claims 3:18,20 29:24
avoiding 38:9	27:2 47:9,10	cause 4:8 5:1 6:5,17	29:25
aware 18:16	bring 18:2 38:10	8:13 13:25 14:6,7	clarify 12:17 46:5
b		24:5,6,6 42:20 48:1	classified 13:7
b 2:11	brings 12:15 34:10	48:15 50:2,7	clear 4:21 7:24
back 12:16 33:13	51:15	causes 27:11	21:17 27:17 29:1
36:11 39:19,25	broad 56:8	cautious 9:21	37:13 48:3 49:23
42:14 45:15,17,19	burden 13:22 28:11	celebrity 16:10	clearly 4:19 29:22
46:1 50:15 57:4	28:23 29:4 50:3	17:11 18:1 26:14	51:2
background 35:21	business 30:5	27:20 37:3,4,17	clerk's 53:17
balance 11:21 16:6	c	centerpiece 20:16	cloak 53:19
36:1		20:21	clock 39:19 50:15
balancing 13:21	c 1:6 13:15 28:22	certain 12:6 21:10	closure 49:3
15:18 43:19 47:18	58:1,1	certainly 27:4 29:10	cognizable 29:23
barrage 27:15	cable 17:12 52:6	38:4 41:18	30:24
based 15:18 18:7	call 11:20 17:15	certify 58:5	come 3:12 8:13 34:9
basis 10:7 24:18	18:1 37:8	cetera 35:20,21	38:18 41:18 50:25
51:13	called 20:16 44:1	champion 27:11	comes 18:14 19:1
bear 29:4	50:7	chance 25:24 44:13	27:12 34:7 40:8
beginning 41:24	camera 9:6	45:23	comfortable 47:15
behave 24:1	captioned 58:8	chandra 52:7	commented 55:12
believe 4:24 7:22	career 17:13	character 54:23	55:19
11:1 21:1 25:14	careful 21:20	characterizations	commitment 5:6
36:21 45:3 49:23	carefully 23:7	45:8	common 13:12
51:10,23 53:23	case 3:17 4:2,4 5:10	characterize 18:9	49:24 56:9
believes 7:4	7:13 8:10 10:18	characterized 12:7	commonwealth
better 42:2,6	11:8,21 14:17 21:7	20:5 45:7	13:21
big 31:2 41:1	21:18,18 22:6,14,20	chatilo 1:9	community 16:14
bit 41:21	22:22 23:10 24:7	check 30:3 45:25	16:19
blank 29:4,7,17 48:6	25:13 26:7,23 27:3	46:9	companies 26:12
body 15:15	27:10,11,19 28:9,10	checked 29:15	company 1:23
books 16:16	29:2,3 30:9,21,24	checking 15:21	compel 46:11,12,12
borough 14:18	31:10 32:9,9,10	chief 56:20	48:5
bottom 24:4 47:22	35:5 36:12,20 37:18	cipollone 4:9,24	complaint 30:12
47:23	38:6,7,25 40:5,16	circuit 4:21 12:23	completely 30:20
boy 42:2	41:4,16,24 43:4,24	14:5 51:3	components 26:15
brief 6:23 8:2 9:4,7	50:3,18,19 51:15,16	circumstances 5:13	concept 18:14 22:3
9:25 11:18 12:11	51:24 52:1,2,15,20	citations 37:12	36:3
16:10 27:5,22,24,24	53:8,10,12,13,14,15	cite 4:14 9:24	concepts 9:10 48:12
28:1 29:16 32:6	53:18,24 54:1,10,16	cited 51:16 52:14	concern 3:20 20:8
36:5,6 43:3,25	54:19,24 55:13,19	cites 8:2 45:8	conclude 34:22 36:4
46:22 47:6,12 55:9	56:1,2,18	city 16:12	42:22
	cases 9:24 10:11	civil 23:3	concluded 57:9
	12:10 14:5 17:21		
	21:16 23:3,3 37:9		

[condit - different]

Page 3

condit 36:21 51:15 51:23,24 52:1,7,9 56:18 condit's 52:22 conduct 21:23 22:4 conference 9:20 13:13 confidential 9:13 26:24 38:12,15 confidentiality 9:16 10:8,11,14,16,23 11:7,10,13 40:1 53:7,9 conflated 35:3 connected 22:8 consider 21:14 considered 29:10,11 consolidated 11:8 constand 1:3 constitutional 13:11 18:20 49:13,24 constitutionally 21:24 content 25:9 contents 4:12 context 37:10 45:20 contract 10:23 controversy 19:22 convicted 22:17 copies 43:23 44:2 47:9,16 corollary 54:4 correct 5:17 58:6 cosby 1:4 3:15 4:5 6:24 7:10 8:3,21 11:14 15:2 16:9 20:8,14 21:1,13 34:16 43:5 50:10,20 56:16 cosby's 4:7 56:21 counsel 33:1 48:18 55:16 56:19 couple 9:24 48:4,21 course 4:15 11:4 20:18 29:3 34:16	41:19 43:4 52:16 court 1:1,23 3:2,6 3:12,16 4:1,24 5:11 5:14,18,20,24 6:2 6:15,18 7:6,11,16 7:19 8:7,11,14,18 8:22 9:18,19 10:2,6 11:17,19,23 12:2,15 12:20,24 13:2,4,6,9 13:19,22,25 14:3,9 14:13,15,19 15:1,5 15:7,13,20,23 16:1 16:4,8,17,20,22 17:14,17,20,23 18:12,15,19,22,25 19:4,7,10,17,21,25 21:9,13,17,24 22:2 22:12,15,19,23 23:1 23:6,9,13,16,19,22 23:25 24:4,15,19,22 25:3,11,18,22,24 26:2,4 27:1 28:3,7 28:11,15,17,20 29:5 29:8,13,22 30:6,9 30:15,17 31:7,17,25 32:3 33:5,21,24 34:1,18,20,22,23,25 35:2,8,10,13 36:9 36:12,15,18,19,23 36:25 37:2,5,20,23 38:3,14,17,18,23 39:7,9,9,18,23 40:1 40:7,11,14,21,25 41:6,8,22 42:16,25 43:8,12,15 44:2,6 44:10,18,19,25 45:1 45:11,14,17,24 46:4 46:14,21,24 47:4,7 47:11,14,14,19,22 47:25 48:8,16,18,24 49:1,3,4,6,9,14,14 49:15,19 50:1 51:13 51:14,17,21 52:5,13 52:17 53:5,6,8,18 53:23 54:2,6,8,12	54:14,17,22,25 55:3 55:7,10,18,22 56:10 57:1,6 court's 28:3 49:25 54:15 courtroom 57:7 courts 5:6 7:1 39:3 39:24 42:12 coverage 20:5,15 covered 55:13 cozen 1:13 cozen.com 1:15 criminal 22:20,21 23:3 crop 27:13 cross 16:1 current 3:25 11:2 12:23 cut 37:25 cv 1:3	defend 50:14 defendant 1:5,13 7:4 17:5 26:5 27:14 28:6 29:25 31:15,16 31:19 38:21 52:10 54:17 55:12 defendant's 32:24 46:11 50:3 defendants 18:10 defended 50:21 defense 14:18 defined 4:9,19 24:10 29:23 30:24 demonstrate 4:8,18 21:4 demonstrated 7:21 51:2 demonstrates 5:8 25:8 denied 23:13 depending 11:20 deposition 7:14 25:4 31:19 32:25 33:9 36:16 41:9,13 44:20 50:11,24,25 51:22 51:25 52:1,3,11,12 52:18,19,24 53:4,13 53:14 depositions 25:5 41:25 45:2,11 51:18 55:14 deputy 57:7 description 2:12 deserves 56:22 designated 3:5 determination 39:25 54:2,12 difference 16:13 17:23 20:25 21:4 25:4 31:2 35:4 different 11:13 12:12,13,14,14 17:9 21:15 49:2 54:22,23 54:23 56:13
d			
		decided 26:18,19 29:2 39:10 deciding 56:12 decision 39:14,15 declaration 7:10 8:6 9:3 34:11,12 dedication 49:25 deemed 4:22 defamation 4:6 18:10 19:1 37:14 50:19 defeat 31:22 defeating 33:19	

[dire - foregoing]

Page 4

dire 21:20,23	door 19:12	enforce 10:23	50:20,24
directly 7:13 25:17	double 45:25 46:9	engaged 26:17	factor 16:25 17:1
disadvantage 5:15	downplays 10:6	enquirer 11:8 46:13	30:3 38:2
31:6	driven 14:17	56:1	factors 11:20,24
disclosed 10:19	drugs 8:4 30:10	enraged 52:25	12:1 14:6,16 15:17
disclosing 10:25	dunne 52:3,25	ensuring 10:8	15:24 24:7 29:9,10
42:18	dunne's 52:2	enter 10:13	29:16,17 37:8,12,24
disclosure 4:20,25	e	entered 8:21,23	44:8,9 48:9,10
13:18 22:8 44:8	e 2:1,11 58:1	10:10 38:11 53:7	56:17,23
disclosures 20:15	earlier 31:10	entering 9:15,21	facts 7:25 8:1,9 9:9
discouraged 40:22	early 32:8 43:23	entertainer 16:10	14:17 33:15,17 34:3
40:23	eastern 1:1	35:16	50:12,22 56:1
discovery 9:15 12:7	eduardo 1:6	entity 14:20	failed 24:5
12:17,25 14:9,10,11	effect 9:22 13:16,17	er 1:3	fair 22:24
22:8 26:18,21,23	efforts 22:5	especially 51:13	fall 24:22
27:1 32:11 39:6	eight 27:10 39:19	esquire 1:9,13	falls 7:2
40:2 41:3,24 42:7	either 18:2 25:4	essentially 7:1 8:12	far 16:11
42:12,14 43:19	39:24 49:22 53:18	et 35:20,21	fashion 16:24
47:16 54:19 56:6,9	electronic 1:20 58:7	evaluate 53:5	fault 43:21
discretion 9:12 10:4	elicited 31:20 32:25	events 20:23	favor 29:18 48:10
discussion 26:6	eliminate 19:13	everybody 23:25	48:11 49:21
dispute 16:21 26:9	embarrass 21:7	57:2	favored 21:25
26:14,19 30:5	embarrassed 32:17	evidence 7:12 9:7	feel 25:11
distinction 35:11	33:16	21:2	female 4:6
56:4	embarrassing 30:15	exactly 12:4 17:10	figure 15:9,10 18:13
distinguish 56:5	30:18 32:2,4,7,10	examine 5:12	18:17,17 19:19 37:1
distinguishable	32:13,15 33:1 34:5	example 14:18	file 3:16 7:16 44:11
56:18	34:9,17,19 35:6	23:18 30:13	54:14
distributing 52:24	43:9 51:7	exception 45:3 56:8	filed 3:6,7 6:20 27:2
district 1:1,1,7 4:4	embarrassment	46:14	28:3 42:13 43:24
17:7 21:15 36:19	4:22,23 5:1 6:5,6,17	exhaustive 15:19	44:14 46:23 51:20
divest 9:11	7:13 30:8,10,22	explain 34:18	54:1,22
docket 4:12 6:19	34:15 35:3 38:10	explained 21:3 51:8	final 24:16
8:16 20:19,20 21:6	42:4,20 56:22	explicit 11:10 14:15	find 17:20
21:9	embodies 49:25	explicitly 15:19	first 3:18 4:10,16
document 6:13,13	embody 13:17	extent 10:22 13:6	5:3 9:2 29:19 30:1
24:18,18 44:20 46:5	emphasize 11:14	eye 16:23 20:10	31:3 48:4
49:15	employee 14:22	26:16 51:10	follow 8:11 21:12
documents 13:23	encourage 10:7	eyes 43:10	23:20 42:4 47:19
24:12,19 29:20 39:6	encouraging 27:7	f	followed 27:16
39:10,14 48:14	44:9	f 58:1	following 23:17
54:25	ended 26:7 29:3	fact 4:7 5:3 9:19	footnote 9:25,25
doing 19:23 39:16	38:8,9,25	11:1,12,13 15:3	forced 32:21 33:10
dominick 52:2,3,25		32:5,8 50:10,13,18	foregoing 58:6

[forever - interests]

Page 5

forever 26:24 39:3 form 46:2 former 14:21 forming 14:3 forth 33:13 45:15,17 45:19 46:1 forward 27:12 frankly 32:22 34:12 43:8 funds 37:15 further 20:20 21:7 36:4 future 41:15 42:24	governmental 37:14 gowen 1:13 2:4 5:22 8:2 26:2,3,5 28:8,13 28:16,19,25 29:6,9 29:15 30:1,7,14,16 31:2,8,18 32:1 33:18,22,25 34:2,21 34:24 35:1,5,9,11 36:2,11,14,17,20,24 37:2,6,21 38:1,4,16 38:20,24 39:8,17,22 40:10,12,15,23 41:1 41:7,20,23 42:17 43:2,13,16 44:22 45:1,13,16,21,25 46:8,19,22 47:3,5,8 47:12,21,23 48:2,9 48:16,17 55:8,9,11 55:20 56:2,11 57:5 gowen's 51:16 great 16:19 greater 40:6 green 4:3 50:18 grew 22:3 grounds 54:14 gsproul 1:12 guess 6:4 18:1 22:17 53:21 guide 17:3 18:23 guy's 32:17	hearing 1:6 24:25 48:25 hearted 36:6 hecht 29:2 heightened 18:18 held 17:2 49:1,2 50:1 helpful 26:8 hmm 6:15 7:6,11,19 8:14 12:19 13:19 19:6,9 31:17 34:23 35:10 40:14,25 42:25 43:12 56:10 holds 36:8 home 19:11 honor 3:4,9,14,15 4:3 6:9,21 7:2,9,17 8:22 9:1,6,12 10:4 12:1 14:8 15:4,12 18:8,16 19:16 20:13 20:19 21:4,13 22:11 23:11 24:17 26:3,6 28:8,14,25 30:8 31:3,8 32:8,24 33:18 34:11 36:2 38:20,21 40:10 41:20 43:13 44:23 45:21 46:8,20 47:3 47:23 48:2,3,17,20 53:25 55:9,20 56:2 56:24 57:5 honor's 31:14 honorable 1:6 hurt 50:23,24 hypothetical 33:23 38:5 40:17 hypothetically 5:21 hypotheticals 41:21	imagine 32:3 41:24 imagined 35:11 40:17 impact 5:9,24 15:8 impairment 48:15 importance 9:9 54:24 important 7:9 9:10 16:20 56:4 importantly 31:13 32:23 37:11 39:5 improper 4:11,15 20:1,5 inclined 44:10 include 13:10 included 41:3 incorporating 13:15 increasing 11:2 indiscernible 12:23 19:24 21:17,18 22:1 24:20 29:12 41:7 42:24 46:3 55:17 individual 35:19 individuals 17:25 26:10,13 38:8 information 3:19,21 3:23 21:19 51:6 informed 24:6 inject 19:2 injected 26:16 31:21 injury 4:20,23 5:2 24:10 29:23 30:6,7 30:11,25 50:13 51:3 55:1 innocent 30:20 inquiry 35:18 inspect 27:18 intend 4:25 interest 16:19 19:23 35:17,19 37:3,4,8 44:5 56:17 interesting 33:6 36:3 interests 29:21
g gag 22:5 23:4,13 gary 36:21 52:7,9,22 gather 39:13 gayle 1:9 3:9 gee 32:17 general 30:22 generally 32:7 george 1:13 26:5 getting 19:16 31:13 ggowen 1:15 give 6:1 25:24 41:13 52:11 given 9:6 19:8 20:20 51:25 55:25 giving 14:16 15:17 glenmede 4:9 go 11:23,25 12:16 34:25 35:24 36:4 42:13 44:6 goes 10:18 24:3 going 5:7 6:3 30:25 40:7,19 52:11 54:4 54:8 good 4:8 13:25 14:6 14:7 24:5,5,6 29:13 42:18 47:25 48:14 50:2,7 government 26:12 37:16	h h 1:4 2:11 half 36:5 happen 24:11 30:25 40:12 53:1 happened 20:22 23:23 39:24 50:16 50:16 55:15 happens 26:13 happy 34:11 hard 32:2 33:18 hear 3:2 heard 27:4,23	i icon 16:11,12 idea 56:15 identified 24:9 33:9 iii 1:13	

[interim - name]

Page 6

interim 38:22	12:4,8,13 13:4,5 14:16 16:12 17:3,9 17:10,11 20:7 21:10 22:7 23:2 24:2,11 24:12 25:12,19,20 33:3,3 34:4,5,8 35:20,25 37:24 38:21 40:19 46:1 49:20 50:12,23 51:1 51:7,12,24 53:12 54:5,10 55:4 knowing 43:22 known 27:6 knows 5:22 koch 1:10	limiting 47:17 lin 52:22 line 14:4 24:4 47:22 47:23 list 15:19 little 41:21 llp 1:10 lodged 27:14 long 26:7,18 longer 31:4 look 5:11 9:6 16:6 27:22,23 34:21 37:8 43:8 48:3 54:25 looking 46:16 lot 18:10 23:15 28:20 34:2 lots 10:12 44:8 lskslaw.com 1:12	52:17 meaning 6:7 56:6 means 14:24 38:21 meant 15:9,10 29:1 33:14 measure 30:10 media 20:16,21 27:15 meet 43:19 47:18 meets 56:16 memoranda 6:19 memorandum 7:24 46:16,24 memory 46:9 55:23 mentioned 33:6 55:16 mentions 38:1 56:19 mere 37:2,4,17 merely 29:1 39:2 41:2 met 47:25 50:8,9 mid 1:23 middle 17:25 mind 43:14 misunderstood 47:5 morality 17:4 20:11 35:20,25 motion 1:6 3:6,7 12:17,18 41:4 42:5 43:19 46:11,11,12 48:4,5 53:5 motions 12:6,8,8,12 12:14 13:2 27:2 42:13,15 45:10 46:10 47:10,17 49:1 56:6,9,12,13 movant 1:9 3:3,5 moved 53:1,2 murdered 22:16 murdering 22:17
j	l	m	n
jr 1:4 judge 1:7 21:22 40:2 judges 23:15 judging 7:18 judgment 14:4 41:11 42:5 judi 1:17 58:4,13 judicial 3:24 9:20 11:2 12:14 13:13 27:7,8,19 44:17 49:17 54:23 55:17 judiciary's 5:6 june 1:4 58:13 juris 14:4 jury 21:14 22:1,3,7 43:1,3,10	lapsed 44:4,5 latest 20:15 law 13:12 19:2 28:7 30:22 46:16,24 49:21,24 56:9 lawsuit 17:6 lawsuits 17:5 lawyer 33:12 52:21 52:22 lawyers 6:20 21:23 22:4,5 45:15 lead 32:10 leading 29:4 learned 26:23 left 26:20 legal 7:24 41:18 legitimate 3:20 19:23 20:8 length 28:9 leucadia 28:9,10,16 level 18:18 levine 1:9 levy 52:7 life 8:4 34:3 lifting 43:25 44:1 46:17 limit 19:14	materials 25:5 33:8 40:3 44:5 matter 3:20 6:25 10:5 11:16 15:15 20:7 32:7,19 57:3 58:8 matters 8:7 10:20 35:17,19,23 51:20 mean 6:22 7:3 10:16 18:23 20:3 25:10 28:13 30:17 33:11 37:24,25 38:15	n name 26:4
k			
kardashians 18:4,9 keep 9:13,17 26:22 keeping 38:11,14 39:3 51:13 kentucky 10:9 kept 36:18 key 38:13 kind 53:19 kinds 30:18 know 5:15 6:10 7:2 7:14,25 8:5 9:17,20			

[named - privacy]

Page 7

named 4:6	36:22	32:3 35:9 37:9,12	place 38:24
national 1:23 11:7	officials 14:23,25	37:13,18 38:1 40:3	plaintiff 1:3 7:3
46:12 56:1	26:10 37:15	40:17 42:19 48:10	8:22 11:4,5,6,9
nature 51:5,6	oh 47:11	53:24 54:5 56:17,23	14:22 24:5,9 29:24
necessarily 25:9	okay 3:2,9 10:2	paper 56:6,13	39:5 54:18
44:6	17:19 24:4 25:18,22	papers 47:18	plaintiff's 46:10,11
need 10:7 25:18,20	26:1 28:15,19 29:9	46:12 48:4,5 52:21	
36:4	29:13 34:20 35:1,8	paragraph 11:10	plaintiffs 4:6 25:13
needs 7:5 44:6	37:20 45:7 46:18	part 23:4 46:25	play 18:14
never 39:9,15 41:4	47:4,11,19,21,22	55:24	played 44:22
50:5 55:12,15,18	48:16,18 49:10,15	partial 44:1 46:16	please 15:5 26:2,4
new 27:13,15 52:23	55:3,7 57:1,6	particular 17:6	33:24 43:15 55:8
news 4:14 20:4	olsen 1:17 58:4,13	50:13	point 5:21 7:9 12:16
52:23	once 55:5	particularized 51:2	12:24 19:7 20:14
newspaper 54:7	open 19:12 50:2	particularly 4:23	21:22 24:16 29:1
nine 20:24 44:3	opening 48:13	5:2 6:6 16:11 17:21	31:14 34:10 37:6
50:16 55:6	openness 27:7 29:7	particulars 27:19	41:15
non 25:6 49:22	48:6	parties 3:22 4:18	points 8:25 48:21
normally 18:8	operator 1:16	9:11,14,23 10:13,15	pool 21:14 43:1,3,10
notable 20:9	opined 35:16	10:22 11:3,12 25:6	portion 56:6
note 7:9 20:13 32:1	opining 35:19	25:10 26:17 38:5	portions 33:9 38:13
noted 32:8 37:2	opposing 33:1	39:25 45:4	47:17 53:4
noting 27:9	opposite 36:8	parts 7:15 50:25	portray 4:10
notion 38:5 43:18	opposition 43:25	51:1	portrays 16:9
novel 48:13	44:1 46:17	party 6:11 8:24	prefer 10:15
number 2:12	order 9:18,22 23:13	13:23 25:4 28:23	preferable 11:1
nutshell 3:11,15	38:22 41:16 53:2,19	41:24 42:2	preference 13:17
	53:20 54:17	passage 5:8 55:5	prejudice 3:25
o	orders 10:23 22:5	pending 4:3 43:5	43:10
	23:4	pennsylvania 1:1	prescription 8:4
o 58:1	outset 20:4	54:6	present 33:12
o'connor 1:13	outside 53:12	people 32:18,18	presented 53:8
oath 33:13	overcome 28:6	person 4:25 16:13	press 1:9 3:10 19:24
object 11:5		16:23 17:10,17,24	25:15 50:20 54:18
obligation 7:22	p	34:6 35:15,15 37:18	presumption 28:4
obviously 21:15	pa 1:3,11,14,24	personal 26:14 34:2	28:18 29:7 48:6
34:15 43:20 51:11	pacer 8:16	personality 54:23	49:18
occur 29:6	page 2:1 6:13,13	perspective 52:8	pretend 50:15
occurred 53:12	24:20,21,24,24	pertains 40:16	pretrial 10:19 22:18
occurs 13:21 29:4,7	pages 25:1 31:11,12	ph 29:2	26:17
offensive 32:22	45:2 48:4,22 49:6,8	phase 26:21	prince 36:14 51:16
offer 36:7 37:21	pansy 4:9 6:14 10:6	philadelphia 1:3,11	51:24
offered 38:5 48:12	11:18,20,24 14:5,12	1:14,24	principles 31:10
office 53:17	14:15 15:8 20:1	phillippi 1:16	privacy 3:21 19:8
official 15:10,12	24:7 29:12,18,19	pieces 56:13	29:19,21 35:2 42:21
17:24 26:11 35:15			

56:22	18:13,17,17 19:19	reasons 10:12 43:9	reporter 58:5
private 10:23 26:17	20:8,10,19 21:6	rebuttal 48:19 55:9	reporting 1:23 4:14
26:21 30:2,3 35:7	26:10,11,11,16,20	recall 53:25	represent 3:10
35:15,22 38:7 41:13	27:7 28:2 31:21	recitation 7:25	18:10 26:5
41:25 42:8	35:14,17,18,19	recollection 23:22	require 7:1
probably 17:12 35:6	36:22,25 37:8,13,15	record 6:10 8:19	required 9:18
45:17	37:15,18 38:9 39:6	45:8 49:17 53:16	requires 6:14 51:3
procedure 44:24	41:11,14 42:5,10,18	54:1	requiring 5:11
proceed 7:8 37:24	42:19 44:4 48:14	recorded 1:20	resources 44:17
proceeding 3:25	51:10 55:12,19	recording 1:20	respect 7:23 11:3,9
7:21 31:23 47:15	56:17	recordings 58:7	20:10 43:17,18
54:4,11 57:9	publication 20:23	records 12:14 27:18	54:13
proceedings 1:20	publicity 20:22	30:5	responsibility 23:21
49:2 50:1 55:17	22:18 27:15 38:9	redact 46:1	restrict 14:24 21:6
58:7	42:4	redacted 7:5 25:1	21:19
process 3:24 27:8,19	publicly 55:20	43:23 44:2,14 45:22	restricts 21:9
55:25	purpose 4:15 20:1,6	46:7 47:8,13,16	retrospect 40:13
produced 1:20 21:2	31:22 33:20	redaction 6:25	retyped 45:4
45:5	purposes 6:4	43:17	review 24:17
production 53:20	put 7:10 11:18	redactions 44:11	right 3:7 12:21
professional 22:4	24:14 45:19	47:2	13:10,12,12,24 14:2
23:21 58:5	puts 20:19	reduce 19:13	14:8,13 15:25 16:3
prohibited 22:4	putting 21:16 49:23	referred 4:2	19:13 22:15,25
promulgated 45:2	q	referring 47:1	24:13 28:2,25 29:5
proof 28:12,24	question 25:16	reflection 5:5	30:14,16 31:7,25
proper 35:18	28:22 30:11,21	refused 23:12 52:13	33:2,21 36:17,23
proposed 47:16	33:19 46:2	regard 53:24	38:23 39:1,6,7,17
proposition 4:14	questions 30:4 33:4	region 1:23	39:22 42:11,14,17
50:1	33:11,14 45:12	registered 58:4	44:7 45:13,16 46:24
prospect 41:18	quote 20:16	regular 17:24 41:19	48:8,24 52:5 54:5
protected 4:16	quotes 27:5,6	related 14:5	54:10 56:9
protecting 29:20	quoting 10:9	relating 20:10	rise 57:7
protection 32:11	r	relationships 26:15	robreno 1:6
protective 9:15,22	r 58:1	release 3:21,22	role 6:25 45:18
53:19	rapper 36:15	released 8:8 31:1	roll 50:15
protest 11:9	reaching 16:14	relevant 16:5	rolling 39:18
prove 18:18	read 37:10,11 43:2	reliance 8:24 40:5	round 20:15
provide 36:8 44:14	reading 34:13	41:17	routine 41:3
provision 11:15	ready 29:16	relied 9:4,5 11:14	rpr 1:17 58:13
prudence 14:4	really 12:4 15:9 20:3	relies 27:5	rule 5:4 8:12 13:16
public 3:20 4:12,12	34:18 35:12 45:18	rely 39:2,2 42:12	22:3 49:25
5:7,9 8:16 10:19	46:3 50:15 52:14	remember 26:9	rules 13:17 23:21
14:19,22,23,24 15:9	reason 5:5 12:3 21:9	repetitions 45:9	run 35:12 36:11
15:10,10,12,15	25:8 43:21	reply 25:25	
16:23 17:3,17,24			

s	seen 22:10 sees sell sense 37:15,18 42:19 sensitive sent sentence separated separately serious 6:6 serve serves service set settle 38:6 42:3,6 settled settlement 8:21 9:5 10:13 14:12 37:22 38:1 40:24 42:23 53:25 54:7,13 settlements 42:24 settling sex sexual sheppard show 28:24 50:3 52:4 showing 28:6 43:6 shown 32:12 sic 41:12 45:12 side 42:3,9 54:11 signature 58:12 signed 11:7,9 signing 9:21 similar 9:14 42:24 simple 27:25	simply 28:2 44:12 single 11:15 43:18 sixth 22:25 slate 29:4,7,17 48:7 slip 41:20 solution 23:3 somebody 40:8 somewhat 5:14,21 24:10 35:3 sorry 7:4 29:24 34:25 47:3 sort 4:11 7:25 17:18 18:1 19:20 23:4,5 30:22 32:10 44:16 sound 1:20 58:7 specific 20:11 24:10 29:23 30:11,24 32:12 43:7 51:2 specifically 32:12 51:3,12 specifics 31:4,11,24 32:15 43:7 speculative 24:11 spend 28:20 sproul 1:9 2:3 3:4,7 3:9,14 5:17,19,23 6:1,8,16,21 7:7,12 7:20 8:15,25 10:3 11:22,25 12:3,19,22 13:1,3,5,8,11,20,24 14:2,8,11,14,21 15:2,6,11,14,22,25 16:3,6,9,18 17:1,16 17:19,22 18:7,13,16 18:21,23 19:3,6,9 19:15,18,22 20:2 22:10,13,16,21,24 23:2,8,11,14,17,20 23:24 24:2,13,16,20 24:24 25:7,20,23 26:1 43:22 48:19,20 48:25 49:5,8,12,16 49:20 51:19 52:6,19 53:21 55:4	stage 26:8 stand 44:3 standard 14:1 18:20 21:8,8 49:2,13 standards 12:13 start 15:21 state 54:6 statements 25:5,15 states 1:1,7 status 56:21 stay 6:12 19:10 stipulation 11:6 stop 39:13 42:9 story 27:20 50:13 52:8 street 1:10,14,24 strong 28:4,6 students 16:15,15 stuff 32:20 40:19 46:3 style 27:15 subject 32:7 subjective 34:15 subjects 30:12 31:21 32:2 33:1 55:13 submit 34:12,16,21 43:22 submitted 44:2 47:8 47:14 sue 10:24 sued 52:9 suffer 4:19 suggest 7:4 27:24 56:12 suggests 15:2 suite 1:10,24 suits 10:24 sullivan 1:9 summary 41:11 42:5 supporting 27:6 44:8 supreme 21:24 sure 3:4 14:20 40:20 42:8 44:13 52:14
s 2:11 sam 22:14 sanctioned 48:14 sanctions 12:9 46:10 48:5 55:25 sat 50:10 saying 14:15 15:16 46:7 50:8,14 says 9:4,4 11:11 24:9 31:15 34:17 39:1 41:25 42:8 scale 21:11 scandal 27:21 scandalous 27:13 schulz 1:10 scope 53:9,17 scrutiny 27:7 seal 3:18,19 5:16,22 6:3,11,12 7:15 8:10 12:5,6 13:23 25:2 27:3 28:23 33:8 36:18 38:18 39:3 40:2 43:25 44:2 46:17 47:13 48:22 52:13,21 53:2 sealed 3:17,18 5:12 39:11,21 40:8 51:18 52:12 54:3,9 sealing 8:13,15 38:22 41:16 44:9 47:17 48:10 49:22 49:22 50:4 53:2 seattle 41:25 42:8 54:19 56:8 secondly 10:6 secrecy 11:2 secret 51:13 see 6:24 8:17 11:21 15:18 20:20 27:5 28:2 32:20 50:9 51:1 54:18,25 seeking 13:23 28:23 54:7	simply 28:2 44:12 single 11:15 43:18 sixth 22:25 slate 29:4,7,17 48:7 slip 41:20 solution 23:3 somebody 40:8 somewhat 5:14,21 24:10 35:3 sorry 7:4 29:24 34:25 47:3 sort 4:11 7:25 17:18 18:1 19:20 23:4,5 30:22 32:10 44:16 sound 1:20 58:7 specific 20:11 24:10 29:23 30:11,24 32:12 43:7 51:2 specifically 32:12 51:3,12 specifics 31:4,11,24 32:15 43:7 speculative 24:11 spend 28:20 sproul 1:9 2:3 3:4,7 3:9,14 5:17,19,23 6:1,8,16,21 7:7,12 7:20 8:15,25 10:3 11:22,25 12:3,19,22 13:1,3,5,8,11,20,24 14:2,8,11,14,21 15:2,6,11,14,22,25 16:3,6,9,18 17:1,16 17:19,22 18:7,13,16 18:21,23 19:3,6,9 19:15,18,22 20:2 22:10,13,16,21,24 23:2,8,11,14,17,20 23:24 24:2,13,16,20 24:24 25:7,20,23 26:1 43:22 48:19,20 48:25 49:5,8,12,16 49:20 51:19 52:6,19 53:21 55:4	stage 26:8 stand 44:3 standard 14:1 18:20 21:8,8 49:2,13 standards 12:13 start 15:21 state 54:6 statements 25:5,15 states 1:1,7 status 56:21 stay 6:12 19:10 stipulation 11:6 stop 39:13 42:9 story 27:20 50:13 52:8 street 1:10,14,24 strong 28:4,6 students 16:15,15 stuff 32:20 40:19 46:3 style 27:15 subject 32:7 subjective 34:15 subjects 30:12 31:21 32:2 33:1 55:13 submit 34:12,16,21 43:22 submitted 44:2 47:8 47:14 sue 10:24 sued 52:9 suffer 4:19 suggest 7:4 27:24 56:12 suggests 15:2 suite 1:10,24 suits 10:24 sullivan 1:9 summary 41:11 42:5 supporting 27:6 44:8 supreme 21:24 sure 3:4 14:20 40:20 42:8 44:13 52:14	

[sure - william]

Page 10

55:10 surprised 43:2	think 6:10,20,21 7:24 8:18,20 9:25 13:16 15:8,9 17:2,2 18:19 19:1 20:4 22:2,13 25:3,8 26:7 28:11,18,22 30:21 32:3 34:13 35:9 36:12 40:5 42:3 43:1 44:4,6,16 45:19 46:5,14,15,25 47:9,19,25 48:3 57:1 thinking 33:7 third 3:22 4:18,21 12:23 25:10 51:3 thorough 21:20 thought 43:17 55:22 55:23,24 three 4:6 49:1 thrust 19:4 20:9 thrusts 19:19 thumb 21:10 time 5:8 28:21 40:18 42:7 44:12 52:3 54:6 55:5 times 41:25 42:8 54:19 56:8 today 5:5 27:23 32:6 44:3 55:14 today's 5:13 31:23 told 40:7 traditionally 26:21 train 43:17 transcriber 1:17 transcript 1:6,20 48:23 49:4,7 52:24 53:4,13 58:6 transcription 1:20 transcripts 24:25 51:23 53:14 55:16 56:7,12 transparency 5:6 tremendous 20:21 22:18	trend 11:2 trial 10:18 21:22 22:24 38:10 41:4,11 41:19 42:5 troubling 45:6 true 30:17 34:3 43:20 52:15 58:6 trust 4:9 trying 39:20 40:15 turning 39:19 tv 17:11,12 52:6 two 8:25 9:8,10 25:1 35:4 39:23 45:3 48:22 49:1,6 53:21 54:14 type 17:9 18:4 types 12:12	urged 21:13 urging 3:16 use 4:12 33:22 37:15 44:17 uses 37:12 utilities 10:10
t			v
t 2:11 58:1,1 tabloid 27:15 tailored 23:7 taint 43:4 tainting 22:2,7 42:25 take 5:11 6:12 10:3 57:3 taken 41:9,13 52:18 52:20,20 53:15 talk 12:12 18:4 22:5 31:23 33:25 35:24 38:6 talked 50:21 52:7 talking 14:23 15:12 15:14,17 31:3,9,14 31:15,18 32:24 37:13 55:14 tasked 9:19 technically 42:11 tell 6:18 25:11 ten 17:6 20:23,24 tends 4:25 term 4:8 6:7 terrible 42:20 48:15 terribly 34:8 terrific 44:23 test 4:17 19:18 43:19 47:18 testimony 8:2 9:3 20:24 31:20 32:25 45:9 50:11 tests 49:24 thank 3:14 25:22,23 26:3 48:16,17,20 55:7 56:25 57:5,6 thing 10:17 18:2,4 18:25 42:3 things 6:22 8:5 9:17 30:19 31:19 39:23 52:15		venture 18:9 verbatim 45:5,9 veritext 1:23 version 33:15,16 34:3 50:11,22 versus 10:9 55:17 victory 42:6 views 11:13 vigorous 33:13 villain 4:11 violate 29:21 violation 30:8 visit 50:12 voice 10:21 voir 21:20,23 vortex 19:20 vs 1:4	
			w
			waiting 6:24 want 30:23 34:4,5 40:2,20 43:16 53:1 wanted 52:11,12,21 wants 27:17,18,20 40:8 44:18 50:4 way 7:7,17 11:18 18:3,3 20:4 21:18 24:3,22,23 40:4 41:1,10 44:22 47:15 49:22 ways 17:3 29:18 we've 26:6 44:13 weigh 35:25 went 28:9 41:4 45:22 50:20 wife 22:17 william 1:4

[wish - zero]

Page 11

wish	25:17
women	25:15
wood	52:22
word	15:3,8 37:19 37:21,22 42:19 43:13,18
words	6:2 10:12,24 16:22 18:5 19:10 38:17 41:12 51:22
work	18:8 41:10
workings	37:16
worth	27:9 42:6
writing	39:13
written	16:15
wrong	42:3
x	
x	2:1,11
y	
y	1:17 58:4,13
yeah	3:12,13,13 11:22 12:2 13:1,3 14:19 15:1,5,11,13 15:20,22,25 16:8 18:12,19,21,22 19:17,21 22:12,19 22:20,21,23,23 23:1 23:9,16,19 24:1,15 25:21 34:1 36:13,19 37:5,20,23 38:3 40:11 41:22 42:16 43:15 44:25 45:24 46:14,15 47:7 49:4 49:5,10 51:19 55:10
year	17:13
years	17:6 20:23,24 20:24 22:14 26:25 27:10 39:19 44:4 50:16 55:6
york	52:23
young	16:15
z	
zero	48:10